A **NASIONCOM HOLDINGS BHD**

v.

SURUHANJAYA SEKURITI

B HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[JUDICIAL REVIEW APPLICATION NO: R1-25-70-2007]
13 NOVEMBER 2007

C ***CIVIL PROCEDURE:*** *Stay of proceedings - Application pending judicial review - Order 53 r. 3(5) Rules of the High Court 1980 - Applicant sought to stay sanctions imposed by statutory body - Whether "stay of the proceedings" confined to conduct of proceedings in court or before a tribunal - Whether also confined to decisions made by a statutory* D *body - Whether O. 53 r. 3(5) to have wider application - Whether granting of stay at the discretion of court - Whether court to consider special circumstances*

WORDS & PHRASES: *"stay of the proceedings" - Order 53 r. 3(5) Rules of the High Court 1980 - Whether confined to conduct of* E *proceedings in court or before a tribunal - Whether also confined to decisions made by a statutory body - Whether O. 53 r. 3(5) to have wider application - Whether granting of stay at the discretionof court - Whether court to consider special circumstances*

F The applicant was listed in 2005 on MESDAQ Market of Bursa Malaysia Securities Berhad and had two subsidiaries. In May 2006, the applicant issued its first annual report for the financial year ended 31 December 2005 accompanied by the Financial Statements of the Group and the Company. Upon investigation, G the respondent was dissatisfied with the explanation proffered by the applicant with respect to the amounts of revenue generated by the subsidiaries which the respondent alleged to be false. The respondent then imposed 2 sanctions: a public reprimand ("1st sanction") and a direction to the applicant to rectify and re-issue H the Applicant's 2005 Financial Statements ("2nd sanction"). The applicant, through its *ex parte* application for judicial review under O. 53 of the Rules of the High Court ("the RHC") sought leave, *inter alia*, for a writ of *certiorari* to quash the decision of the respondent and for an interim stay order of the two sanctions till I the final determination of the application. The respondent contended that the application for an interim stay was misconceived in that the phrase "stay of proceedings" in O. 53

r. 3 of the RHC is confined to conduct of proceedings in court or before a tribunal and not to a decision of a statutory body like the respondent where there was no proceeding involved.

Held:

(1) The wording of O. 53 r. 3(5) of the RHC has to have wider application and had it been intended that the proceedings to which the application relate "should only refer to judicial proceedings", one would have expected the curtailment to have been specified by qualifying the word "proceedings". (para 15)

(2) It is trite that the grant of leave in judicial review proceedings is an exercise of the court's discretion and consequently pursuant to O. 53 r. 3(5) of the RHC which states, "The grant of leave under this rule shall not, unless the judge so directs, operate as a stay of the proceedings in question" is likewise discretionary. As to the proper exercise of this discretion, the court would need to consider whether there are special circumstances which warrant a stay of the proceedings. (paras 16 & 17)

(3) The applicant had shown that it was indeed necessary to grant a stay. However this only applied to the 2nd sanction and not to the 1st sanction since the press release had already been carried out and there was no further purpose to be achieved if a stay was granted. (para 19)

[Order accordingly.]

Case(s) referred to:

Foreign Affairs Trade and Industry v. Vehicles and Supplies Ltd and Anor [1991] 4 All ER 65 ***(refd)***

Kerajaan Malaysia v. Ekran Bhd [2006] 5 CLJ 92 HC ***(refd)***

Kosma Palm Oil Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

R v. Secretary of State for Education and Science, ex parte Avon County Council [1991] 1 All ER 282 ***(refd)***

Re Khong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Khong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2) [1974] 1 LNS 136 FC ***(refd)***

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2002] 2 CLJ 697 CA ***(refd)***

YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v. Datuk Bandar Kuala Lumpur & Anor [2003] 1 CLJ 210 HC ***(refd)***

Legislation referred to:
Legal Profession Act 1976, s. 46A
Rules of the High Court 1980, O. 53 r. 3(5)

Jamaica Civil Procedure Code, s. 564B(4)
Rules of the Supreme Court [UK], O. 53 r. 3(10)(a)

Other source(s) referred to:
The Supreme Court Practice 1995, vol 1, Pt 1, p 842
The Supreme Court Practice 1995, vol 1, Pt 1, 863 para 53/1-14/27

For the applicant - Walter Pereira; M/s Kamaruddin & Partners
For the respondent - Tommy Thomas; M/s Tommy Thomas

Reported by Amutha Suppayah

JUDGMENT

Lau Bee Lan J:

[1] The applicant, Nasioncom Holdings Sdn. Bhd., through its *ex parte* application for judicial review under O. 53 of the Rules of the High Court ("the RHC") dated 27 March 2007 (encl. 1) sought leave for the following reliefs:

(a) for a writ of *certiorari* to quash the decision of the respondent, Securities Commission ("SC"), dated 15 February 2007 in imposing a public reprimand ("1st sanction") and to direct the applicant to rectify and re-issue the Applicant's 2005 Financial Statements by excluding from the Group revenue of RM194,984,186, the sum of RM143,109,727 ("2nd sanction").

(b) an interim stay order of the two sanctions which the SC has imposed till the final determination of the *ex parte* application or of the substantive application.

(c) for a declaration that the decision of the respondent dated 15 February 2007 in imposing the two sanctions acted with *mala fides* and/or abuse of authority and/or did not act with fairness and was unreasonable and/or the respondent was biased and acted in contravention of the basic rights of the applicant.

[2] Broadly, the background facts are as follows. The applicant was listed in 2005 on MESDAQ Market of Bursa Malaysia Securities Berhad and has an authorised share capital of RM100,000,000 of which RM80,000,000 is issued and fully paid-up as ordinary shares of RM0.10 sen each.

It is principally an investment holding company and the principal activities of its subsidiaries namely Nasioncom Sdn Bhd and Express Top Up Sdn. Bhd. (ETU) are wholesale of telephony prepaid cards, retailing of telephony prepaid cards, provision of voice and data services, broadband internet access and information technology solutions to corporations and home users.

In May 2006, the applicant issued its first annual report for the financial year ended 31 December 2005 accompanied by the Financial Statements of the Group and the Company (exh. TKS1). After inspection and investigation conducted by the respondent's officers at its premises and various correspondences, the respondent was dissatisfied with the explanation proffered by the applicant with respect to the amounts of revenue of RM104.19 million generated by ETU and RM90.89 million generated by Nasioncom Sdn. Bhd. for the financial year ended 31 December 2005 which the respondent alleged to be false as per the show cause letter exh. TKS5. The applicant's contention was that they were actual sales and that a significant proportion of the trade receivables were collected by the end of the calendar year 2006 as per applicant's reply letter, exh. TKS6. The respondent imposed the 2 sanctions as per exh. TKS7 (also exh. SC1). It is not disputed that leave to apply for an order of *certiorari* and declaration was obtained on 18 April 2007. With respect to the application for an interim stay order, the respondent opposed it and hence the subject matter of the hearing before me.

[3] The applicant in urging the court to grant interim stay principally on the ground that there are special circumstances relied on:

a) The English position of O. 53 r. 10(a).

b) *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v. Datuk Bandar Kuala Lumpur & Anor* [2003] 1 CLJ 210 (HC).

A c) *Re Khong Thai Sawmill (Miri) Sdn. Bhd.; Ling Beng Sung v. Khong Thai Sawmill (Miri) Sdn. Bhd. & Ors (No. 2)* [1974] 1 LNS 136 (FC).

d) *Kerajaan Malaysia v. Ekran Bhd.* [2006] 5 CLJ 92.

B **[4]** The respondent in urging the court to refuse the application argued on two grounds:

a) the application for an interim stay as a matter of law is misconceived in that the phrase "stay of proceedings" in C O. 53 r. 3 of the RHC is confined to conduct of proceedings in court or before a tribunal and not a decision of a statutory body like the respondent where there is no proceeding involved. For support of this proposition, the Privy Council case of *Foreign Affairs Trade and Industry v. Vehicles and Supplies* D *Ltd and Anor* [1991] 4 All ER 65 and the case *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2002] 2 CLJ 697 (CA) were cited; and

b) on the facts of the case itself, there is nothing to stay.

E **[5]** It is common ground that the application for an interim stay order is premised on O. 53 r. 3(5) of the RHC which reads:

> The grant of leave under this rule shall not, unless the Judge so directs, operate as a stay of the proceedings in question

F **[6]** As correctly pointed out by the learned counsel for the applicant, Mr. Walter Pereira, the English position as governed by O. 53 r. 3(10) Rules of the Supreme Court ("RSC") referred in *The Supreme Court Practice* 1995 Vol 1 Pt 1 at p. 842 is almost G similar to our O. 53 r. 3(5) save for the fact that in England, the stay of proceedings is invariably automatic with a grant of leave for judicial review unless the court otherwise orders; whereas the Malaysian position is the converse. Order 53 r. 3(10)(a) of the RSC provides:

H (10) Where leave to apply for judicial review is granted, then:

(a) if the relief sought is an order of prohibition or *certiorari* and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the I Court otherwise orders;

[7] With reference to the argument of the learned counsel for the respondent, Mr. Tommy Thomas, of importance is the phrase "stay of proceedings" contained in O. 53 r. 3(5) of the RHC which he submitted has been interpreted to refer only to proceedings relied on what was held before a court or tribunal inferior and it does not extend to an executive decision which has already been made by a statutory corporation like the SC. In support Mr. Thomas relied on what was held by the Privy Council in *Vehicles and Supplies Ltd (supra)* at p. 66:

> (3) A stay of proceedings was an order which put a stop to the further conduct of proceedings in court or before a tribunal at the stage then reached, the object being to prevent the hearing or trial taking place. As such it merely meant that any proceedings taking place while the stay was in force were ineffective and it was not an order enforceable by proceedings for contempt since by its nature it was not capable of being breached by anyone and thus could have no possible application to an executive decision which had already been made. Furthermore, a stay could not act as an injunction by a sidewind. The judge when granting the *ex parte* stay of allocations had either granted relief which was inappropriate and inapplicable in the circumstances because there were no 'proceedings' on which a stay could take effect or sought to grant an injunction against the minister by inappropriate means, but in either case the order was meaningless. The appeal would therefore be allowed and the order staying the allocations set aside.

[8] In order to comprehend the full import of the Privy Council's judgment in relation to the issue of stay of proceedings, the facts of the case as per the headnotes is stated. The applicants, who were retail motor dealers in Jamaica, were aggrieved at a reduction in the allocation of imported motor vehicles made to them for the year 1988-89 by the sole importer which was licensed by the Minister of Foreign Affairs, Trade and Industry to import motor vehicles into Jamaica. The importer Jamaica Commodity Trading C. Ltd. (JCTC) was a corporation owned or controlled by the Jamaican government and the allocation was made at the direction of the minister. The applicants issued a summons for leave to apply for an order of *certiorari* to quash the allocations, alternatively an order of prohibition directed to the minister prohibiting him from implementing the allocation or alternatively an order of *mandamus* directing the minister to make a fair allocation and further seeking an order that all allocations be stayed pending final determination of the proceedings. The judge in chambers made an *ex parte* order

granting the relief sought including the stay of allocations. The applicants threatened to bring contempt proceedings against the minister if any contract to import vehicles was concluded by the import corporation. The minister applied for the order to be set aside on the grounds that the allocation had already been made and that well before the order was made by the judge instructions had been given to the import corporation to order vehicles. At the hearing of the minister's summons by another judge the stay was lifted. On appeal by the applicants the Court of Appeal of Jamaica allowed the appeal and reimposed the stay. The Minister appealed to the Privy Council on four issues and one issue which is of relevance here is issue "(iii) whether a stay of proceedings which arose when leave was granted pursuant to s. 564B(4) of the Judicature (Civil Procedure Code) Law of Jamaica to apply for an order of prohibition of *certiorari* was in the nature of injunctive relief and, if so, whether injunctive relief could be granted against the Crown, and/or officers of the Crown". The Privy Council's answered in the negative whilst the second part of the issue is irrelevant for our purposes.

[9] Section 564B(4) of Jamaica Civil Procedure Code (the material part) provides:

> ... the grant of leave under this section to apply for an order of prohibition or an order of *certiorari* shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application or until the court or judge otherwise orders.

It is to be observed it is couched in almost similar fashion as O. 53 r. 3(10)(a) of the RSC. The Privy Council's judgment on the concept of "stay of proceedings" as I have adverted to earlier has in my view to be taken and seen in its context when at p. 71 at para. g-l through p. 72 para a the Privy Council opined "As it was there were no 'proceedings' in being upon which the 'stay' could take effect ... Either Clarke J (1st judge) was granting relief (stay) which was entirely inappropriate and inapplicable to the circumstances before him or he was seeking to enjoin the activities of JCTC, which was not a party to the earlier action ..." Why? Prior to this it observed "In the context of an allocation which had already been decided (by the Minister) and was in the course of being implemented by a person who was not a party to the proceedings (JCTC), it was simply meaningless. If it is was desired to inhibit JCTC from implementing the allocation which

had been made and communicated to it, or to compel the appellant (the Minister), assuming this was possible, to revoke the allocation or issue counter-instructions, that was something which could be achieved by injunction, either mandatory or prohibitory, for which an appropriate application would have had to be made." A

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[10] In the instant case, the facts and circumstances are different. The SC is a party to the proceeding or action being the respondent. Unlike the Privy Council case, here the 1st sanction has been implemented by the SC ie, the public reprimand has already been made *vide* a press release made on 15 February 2007 (exh. SC2), a date before the filing of the application on 27 March 2007. As for the 2nd sanction, it was argued on respondent's behalf the time limit specified by SC to rectify and reissue its 2005 Financial Statements has expired, the deadline being 15 April 2007; hence since the applicant has failed to comply, "there is nothing for the court to stay and the stay order sought is meaningless and is of no practical utility". I am of the view that the contention of the respondent is flawed because as learned counsel for the applicant submitted, they filed the application for judicial review including stay on 27 March 2007 ie, before the expiry of the deadline for the compliance of 2nd sanction being 15 April 2007 and indeed, if the court is to adopt the respondent's argument, it will open the floodgates to parties to seek long dates and then turn around and say the applicant did not comply with an order or decision of the authority or body concerned. C D E F

[11] As for the case of *Sivarasa Rasiah (supra)*, Mr. Thomas submitted that his application of stay pending the final determination of the proceedings was not granted by the High Court and the Court of Appeal on the premise that it was the Attorney General Chambers' argument that there was no proceeding before the Bar Council as the applicant (Sivarasa Rasiah) was disqualified from holding office by an Act of Parliament (s. 46A of the Legal Profession Act) following the case of *Vehicles and Supplies Ltd (supra)*. However I cannot find such an argument canvassed in the body of the judgment; hence with respect I find the aforesaid case to be of no assistance in this matter. G H

[12] Having shown why I cannot accept the position taken by the learned counsel for the respondent on the interpretation to be accorded to the phrase "stay of proceedings", I now turn to the approach adopted by the learned counsel for the applicant. In the I

A case of *R v. Secretary of State for Education and Science, ex parte Avon County Council* [1991] 1 All ER 282, the applicant council wished to reorganise secondary education in its area and applied to the Secretary of State for approval to do so. At the same time the governors of a school in the area, who were opposed to the
B council's plans, applied to the Secretary of State for grant-maintained status. The Secretary of State decided to reject the council's proposals and to approve the acquisition of grant-maintained status by the school and made an order giving it grant-maintained status. The council applied for leave to apply for
C judicial review by way of an order of *certiorari* to quash the Secretary of State's decisions and the order and also sought stay of the implementation of the order until the determination of the application. The judge granted the council leave to apply for judicial review but held that he had no jurisdiction to grant a stay
D of the implementation of the Secretary of State's decisions and the proposal for the school to become grant-maintained. The council appealed against the refusal of a stay (see headnotes). It is to be noted just like the contention of the learned counsel for the respondent in the present case, the Secretary of State
E contended, *inter alia,* that although under O. 53 r. 3(10)(a) of the RSC the grant of leave to apply for judicial review operated as a stay of the proceedings to which the application relates it was only the proceedings of a court which were thereby stayed.

F **[13]** The Court of Appeal held, *inter alia*, that r. 3(10)(a) is not, as counsel for the Secretary of State held contended confined to cases where the judicial review application relates to judicial or quasi judicial proceedings, but enables the court to impose a stay on "the process by which the decision challenged has been
G reached, including the decision itself. Thus, on the grant of leave to move for judicial review, the court has jurisdiction, where appropriate, to stay the decision making process (if it has not been completed), the decision itself and its implementation, (see also *The Supreme Court Practice* 1995 Vol. 1 Pt. 1 at p. 863 para 53/1-14/
H 27.

[14] At p. 287 para d to e, Taylor LJ made the following observation:

> The wording of RSC Ord 53, r. 3(10) is in the widest terms.
I The introductory phrase 'Where leave to apply for judicial review is granted ...' appears to cover the whole field of judicial review. Had it been intended that 'the proceedings to which the application relates' in sub-para (a) should refer only to judicial

proceedings, one would have expected the curtailment to have been specified either in the introductory phrase or by qualifying the word 'proceedings' in sub-para (a). A

[15] Hence I would like to adopt the dictum and apply it in the context of O. 53 r. 3(5) of the RHC in that the wording of O. 53 r. 3(5) has to have wider application and had it been intended that the proceedings to which the application relate "should only refer to judicial proceedings", one would have expected the curtailment to have been specified by qualifying the word "proceedings". In fact the approach that the phrase 'a stay of proceedings' must have a wider application and is not confined in a court alone but is wide enough to encompass the categories alluded to above was taken by Ramly Ali J in *YAM Tunku Dato' Seri Nadzaruddin ibni Tuanku Ja'afar (supra)*, with whose decision I agree, following *Secretary of State for Education and Science, ex parte Avon County Council (supra)*. B C D

[16] It is trite that the grant of leave in judicial review proceedings is an exercise of the court's discretion and consequently pursuant to O. 53 r. 3(5) of the RHC which states, "The grant of leave under this rule shall not, unless the judge so directs, operate as a stay of the proceedings in question" is likewise discretionary. E

[17] As to the proper exercise of this discretion, the court would need to consider whether there are special circumstances which warrant a stay of the proceedings. In this regard, support is drawn from the Federal Court case of *Kosma Palm Oil Sdn. Bhd. & Ors v. Koperasi Serbausaha Makmur Bhd.* [2003] 4 CLJ 1 *(supra)*, which although is a case with respect to an application for stay of execution pending appeal, the principles as to what constitute "special circumstances" would in my view, nevertheless apply. At p. 266 F to p. 267B, Augustine Paul JCA (now Federal Court Judge) after referring to various authorities in particular opined, "The definition of special circumstances only serves to emphasize the fact that there are myriad circumstances that could constitute special circumstances with each case depending on its own facts. I am of the opinion that the list of factors constituting special circumstances is infinite and could grow with time. Any attempt to limit the list or close a category would be to impose a fetter on the exercise of the discretion less of a discretion. This is surely not what discretion is all about." F G H I

A At p. 268B to C, immediately after quoting *Re Kong Thai Sawmill (Miri) Sdn. Bhd. (supra)*. His Lordship further opined, "It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact **that an appeal would be rendered nugatory if stay was refused is the most** B **common one. It is an example of special circumstances**". (emphasis added). (See *Ekran Bhd. (supra)* at p. 102 to 104).

[18] Reverting to the facts and circumstances of this instant case, it is the applicant's contention that compliance with the 2nd C sanction imposed by SC would cause:

i. in the event the Financial Statements for the year 2005 are re-issued, the proceedings for a judicial review, would be academic and the applicant would suffer great damages (para. 28 of the affidavit in support of Tham Kok Sing);

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ii. the payments received on account of these sales, which is the subject matter of judicial review herein, would amount to funds unaccountable for and affect investors' or shareholders' confidence (para. 29 of the affidavit in support of Tham Kok E Sing); and

iii. compliance would also prejudice the criminal proceedings against 2 directors of the applicant on charges arising from the directive of the respondent to re-state the applicant's annual F audit accounts, (para. 9 of Hiew Wei Pong's affidavit in reply).

[19] I am conscious of the averments made by Kiran Kaur Gill on behalf of the respondent to the effect that the SC should not G be prevented from exercising its statutory duties. In my view that is the least the court wishes to do; at the end, the court is guided by the principle whether there are special circumstances which warrant a stay of proceedings being proven by the applicant. I find that the applicant has shown that it is indeed necessary to grant H a stay; however this will only apply to the 2nd sanction but not to the 1st sanction pertaining to the press release which has already been carried out and there is no further purpose to be achieved if a stay is granted.

Order accordingly.

I